No. 92-1629

Supreme Court, U.S.
FILED
MAY 19 1993
OFFICE OF THE CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

SAMSUNG ELECTRONICS AMERICA, INC.,
a New York corporation, and
DAVID DEUTSCH ASSOCIATES, INC.,
a New York corporation,
Petitioners,

VS.

VANNA WHITE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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1. The Court of Appeals actually considered and decided the question of whether or not petitioners have a First Amendment defense. Respondent Vanna White

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* There have been no material changes in the parents or subsidiaries of petitioners since the petition was filed.

concedes that the Court of Appeals considered and rejected any defense under the First Amendment. Opposition, pp. 3, 10-11; see Pet.Appx. A, pp. 11-12 & n.3. It is an "elementary rule that it is irrelevant to inquire . . . when a Federal question was raised in a court below when it appears that such question was actually considered and decided." Orr v. Orr, 440 U.S. 268, 274-275 (1979). In any event, petitioners did raise their First Amendment concerns in the district court (Opposition Appx. B, pp. 23-25) and the Court of Appeals (Opposition Appx. D, pp. 44-46). See Lucas v. United States, 807 F.2d 414, 417-418 (5th Cir. 1986) ("technical failure to comply" with Fed.R. Civ.P. 8(c) not fatal, where legal issue raised at "pragmatically sufficient time").

2. The Vanna White parody should be protected under the First Amendment. The advertisement is a parody "intended to depict a robot, playing the role Vanna White currently plays on the Wheel of Fortune." Pet.Appx. A, p. 19 (Alarcon, J., dissenting). This Court's decision in Hustler Magazine v. Falwell, 485 U.S. 46 (1988), establishes that such an "ad parody" is protected under the First Amendment. 485 U.S. at 50. A parody need not "depict" or "represent" the person being parodied (see Opposition, pp. 7-9); respondent's own authority recognizes that a parody need only "conjure up" the original person (see Elsmere Music v. National Broadcasting Co., 623 F.2d 252, 253, n.1 (2nd Cir. 1980)). The fact that the Vanna White parody does not actually "depict" or "represent" Vanna White, and instead de-

picts a robot playing her role on Wheel of Fortune, does not in any way lessen its First Amendment protection.

3. Respondent's reliance on *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), is misplaced. Zacchini addressed the unique situation where the media "broadcast a performer's entire act without his consent." 433 U.S. at 575. Zacchini expressly distinguishes that appropriation from the unauthorized use of a person's name or picture:

> "[T]he broadcast of petitioner's entire performance, unlike the unauthorized use of another's name for purposes of trade or the incidental use of a name or picture by the press, goes to the heart of petitioner's ability to earn a living as an entertainer." 433 U.S. at 576.

Thus, Zacchini, by its own terms, does not control here.

4. This Court's recent opinion in *Edenfield v. Fane*, 61 U.S. Law Week 4431 (U.S. Apr. 26, 1993), underscores the need for review of the questions presented. This Court's recent opinion in Edenfield acknowledges that "ambiguities may exist at the margins of the category of commercial speech." 61 U.S. Law Week at 4432. Indeed, as discussed in our petition, this Court's opinions still leave unresolved the precise test for determining what is "commercial speech" or "'core' commercial speech" that may be entitled to lesser constitutional protection. Moreover, Edenfield confirms that even with commercial speech that proposes a commercial arrangement, the Central Hudson test must be applied.

Ibid. Here, the Court of Appeals summarily rejected any First Amendment defense without applying the Central Hudson test.

This Court should resolve the important issues presented and define the contours of protected parody and "commercial speech."

Respectfully submitted,

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